

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM RANDOLPH HARLOFF,

Defendant and Appellant.

B244649

(Los Angeles County

Super. Ct. No. NA091217)

APPEAL from a judgment of the Superior Court of Los Angeles County. James B. Pierce, Judge. Affirmed in part and reversed in part.

Dawn Schock, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

An information, filed on May 10, 2012, charged William Randolph Harloff with willful infliction of corporal injury on a cohabitant (Pen. Code, §273.5, subd. (a)¹), false imprisonment (§ 236) and criminal threats (§ 422, subd. (a)). On the corporal injury count, the information specially alleged a great-bodily-injury enhancement (§ 12022.7, subd. (e)). On the corporal injury and false imprisonment counts, it specially alleged a deadly-or-dangerous-weapon enhancement for personal use of a hammer (§ 12022, subd. (b)(1)). It also specially alleged prior prison terms under section 667.5, subdivision (b).

A jury found Harloff guilty of all three counts and the special allegations of great bodily injury and personal use of a deadly or dangerous weapon true. After Harloff had waived his right to a jury trial on the prior-prison-term allegations, the trial court found that Harloff had served four prior prison terms within the meaning of section 667.5, subdivision (b). The court sentenced Harloff to 14 years in state prison, consisting of the high term of four years for willful infliction of corporal injury on a cohabitant, plus the high term of five years for the great-bodily-injury enhancement, one year for the deadly-or-dangerous-weapon enhancement and one year for each of the four prior prison terms. The court imposed sentence on the false imprisonment and criminal threats counts but stayed execution under section 654.

Harloff contends that the judgment must be reversed because the trial court committed prejudicial federal and state error by allowing approximately an hour of the trial to proceed in his absence without affording his counsel the opportunity to communicate with him to determine why he was not in court. He also contends the court erred by requiring him to register as a sex offender pursuant to section 290, subdivision (c). We agree that the registration requirement was erroneous and thus reverse that part of the judgment. We, however, conclude that Harloff has not demonstrated prejudicial error with respect to his limited absence from trial and thus affirm the judgment in all other respects.

¹ Statutory references are to the Penal Code.

DISCUSSION

1. *Harloff Did Not Demonstrate Prejudicial Error Based on His Absence from Trial*

“A criminal defendant’s right to be present at trial is protected under both the federal and state Constitutions. [Citations.] ‘The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, [citation], but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.’ [Citation.] Our state Constitution guarantees that ‘[t]he defendant in a criminal cause has the right . . . to be personally present with counsel, and to be confronted with the witnesses against the defendant.’ [Citation.] [¶] Sections 977 and 1043 implement the state constitutional protection. [Citations.]” (*People v. Guiterrez* (2003) 29 Cal.4th 1196, 1202.)

In this case, Harloff, who as of the time of trial was in a wheelchair due to back pain, was present on the first day of trial when the jury was selected and sworn. On the second day, Harloff was not present. He went to the doctor in the morning and afterward was returned to jail instead of being taken to court. Because of Harloff’s absence, the trial court did not hold trial that day and dismissed the jury until the following day. Later that afternoon, Harloff arrived in court, complained of pain and was taken to the hospital. Harloff and the brother of his friend, whom Harloff had seen in jail and now was to be a witness at trial, reported that they had been traveling to court together in a van, as both were in wheelchairs, and the wheelchair of the brother of his friend had run into Harloff, which caused Harloff further injury. The following day, Harloff did not appear in court as scheduled. The court received reports that Harloff and the brother of his friend were refusing to leave their cell and that Harloff was stating that the doctors had directed bed rest for him. The court, believing that Harloff was malingering, issued an extraction order. Harloff came out of his cell and requested a medical evaluation. The court then found Harloff voluntarily absent from trial and began the proceedings. Harloff was cleared by medical personnel and arrived at court about an hour after the proceedings had commenced. Harloff missed preliminary jury instructions, the prosecution’s opening

statement and a portion of the victim's direct examination. According to Harloff, his absence from trial for approximately an hour constituted a violation of his federal and state rights.

We need not address the claimed substantive violation because the matter can be resolved by a prejudice analysis. Harloff contends that his limited absence from trial prejudiced his case because he was not present for the reading of jury instructions at the outset of the case and part of the victim's direct examination. We disagree that Harloff has demonstrated prejudice, whether error is judged under the federal standard for constitutional error (*People v. Hovey* (1988) 44 Cal.3d 543, 585 [purported violation of constitutional right to be present at trial assessed under harmless beyond a reasonable doubt standard in *Chapman v. California* (1967) 386 U.S. 18, 24]) or the state standard for statutory error (*People v. Jackson* (1996) 13 Cal.4th 1164, 1211 [violation of statutory right to be present at trial evaluated for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 standard requiring a showing that it is reasonably probable that a result more favorable to the defendant would have resulted absent the error]).

As to the jury instructions given in Harloff's absence, they consisted only of preliminary instructions on procedural matters prior to the People's opening statement. The preliminary instructions were admonishments not to discuss the case, do independent research or speak to any party, witness or lawyer involved in the case and directions to follow the court's definitions of terms, be open minded and use note taking in a proper way. As relevant, these preliminary instructions were repeated in the full set of instructions before deliberations when Harloff was present. Harloff's absence for these preliminary instructions was harmless.

As to part of the victim's direct examination, Harloff contends that his absence was prejudicial because the victim testified in more detail about the attack at trial in the short time he was not there than she did in his presence at the preliminary hearing. On cross-examination, when asked about her reluctance to identify Harloff at the preliminary hearing, the victim stated that she had been scared of retaliation. Later, on redirect examination, the victim admitted that, because she "was scared," she had lied

during the preliminary hearing by saying she could not remember certain details of the attack. The victim said, “Mr. Harloff was right there. And in the same chair he’s sitting now. And just earlier today when I was speaking about those things, and I did remember Mr. Harloff was not present in that chair, and it made it a lot easier for me to talk about it and to say it because . . . back then and I still am, like I said, he said that, if I ever put him in jail, I better move out of the area because his homeboys would come after me. And . . . I was living in the area back then still, and that’s why. And I was very scared.”

Harloff isolates the victim’s statement that it was easier for her to testify when he was not present to claim that his absence was prejudicial. But that statement when viewed in context and in the totality of the evidence does not demonstrate prejudice. Although the victim was reluctant to answer questions at the preliminary hearing and said she could not remember many details, she did admit that she was hit in the head and on her hands and that another person caused her to suffer those injuries—statements that were consistent with her trial testimony and her injuries. Her trial testimony about the attack, given in Harloff’s absence, was consistent with her statements to her neighbor and to a police officer after the attack, and both the neighbor and the police officer testified at trial about her appearance and reports to them after the attack. Harloff was present for the latter part of her direct examination, cross-examination and redirect examination, and at no point when he was there did she recant or alter any of the trial testimony she had given in his absence. Moreover, Harloff’s defense, presented through his own testimony and that of his friend’s brother, was that the victim had hit herself repeatedly, including with a car distributor, which caused the injury to her head, and that he had slapped her across the face only once because she was out of control. Harloff’s account of the incident was inconsistent with the nature and extent of the victim’s injuries, which, as stipulated by the parties, were multiple contusions and lacerations on her head, hands, arms and knee, as well as a laceration on her scalp requiring five to six staples. In any case, even assuming Harloff were not absent from trial and the victim testified in his presence just as she had at the preliminary hearing, that testimony in conjunction with the testimony of the neighbor and the police officer and the nature and extent of the victim’s

injuries, whether Harloff put on a defense or not, is overwhelming such that it establishes that any error from proceeding in his absence was not prejudicial under either the federal or state standard.

In addition, before the trial court began trial in Harloff's absence, it directed the jury, "It's obvious that Mr. Harloff is not here. His lack of presence is not to be taken by you either positively or negatively. It's a nonissue. You're not to be concerned about it. You're not to speculate as to why he's not here and so forth. And he may be present later on. But in any event, it's, again, not to be taken by you as a negative factor, and you can't, in any way, use bias against him because of his lack of presence. You can't have sympathy for him in a positive way in any way because he's not here. It's just a nonissue, and you're not to consider that in any way, shape, or form." Later, in instructing before deliberations, the court told the jury, "The fact that [the] defendant was absent for a portion of the trial is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations." It is presumed the jury followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)²

² Contrary to Harloff's argument, *People v. Murphy* (2003) 107 Cal.App.4th 1150, is inapposite to the result here. There, the trial court allowed a victim in a sexual assault case to testify behind one-way glass so that she did not have to see the defendant. Reversing the judgment, the appellate court concluded that, "[e]ven assuming that, in an appropriate case, the court might allow a testifying adult victim, who would otherwise be traumatized, to use a one-way screen to avoid seeing a defendant without violating the right of confrontation, we do not think a court may do so without making the necessary factual findings based upon evidence. In other words, a court may not, as the court did in this case, dispense with complete face-to-face confrontation merely upon a prosecutor's unsworn representation that defendant's presence was part of a distraught adult witness's problem. In our view, the court's ruling was not based upon an adequate 'case-specific finding of necessity.' [Citation.] We are unable to say that the error was harmless beyond a reasonable doubt [citation], especially since the pivotal issue was the alleged victim's credibility." (*Id.* at p. 1158.) This case is different. Although Harloff missed a portion of the victim's direct examination, he did confront her and her testimony was consistent with her admissions at the preliminary hearing, the accounts of other witnesses who saw and spoke to her after the attack and the nature and extent of her injuries.

2. *The Sex Offender Registration Requirement Is Erroneous*

The information alleged the charged crimes as serious felonies, violent felonies or offenses requiring sex offender registration pursuant to section 290, subdivision (c). At sentencing, the trial court imposed a registration requirement. None of the offenses of which the jury convicted Harloff, however, is listed in section 290, subdivision (c), as a crime requiring registration. Accordingly, the registration requirement is erroneous.³

DISPOSITION

The judgment is reversed to the extent that it requires Harloff to register as a sex offender pursuant to section 290, subdivision (c). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

MILLER, J.*

³ The abstract of judgment does not reference the registration requirement. It nevertheless was ordered by the trial court at sentencing and is unenforceable.

* Judge of the Los Angeles Superior Court, Assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.